IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 623

O. J. OOSTERHOUDT, *Appellant*

v.

ROBERT M. MORGAN et al., as and constituting the FLORIDA STATE BOARD OF ACCOUNTANCY, *Appellees*

MOTION TO DISMISS

Appellees in the above-entitled case move to dismiss this appeal, pursuant to the provisions of Rule 16 (b) of this Court, on the following grounds:

(1) This appeal does not present any substantial federal question;

(2) The federal questions sought to be reviewed were not expressly passed upon below; and

(3) The judgment of the Supreme Court of Florida rests on an adequate non-federal basis.

COUNTER-STATEMENT OF THE CASE

For the purposes of this motion, appellees believe that the Statement of the Case made by appellant is, in the main, substantially correct, inasmuch as the trial court entered a Summary Final Decree based on the

pleadings of record without the introduction of evidence and the Statement contains an abstract of the material parts of the pleadings of record below, with two exceptions, however:

(1) The summary of the appellant-plaintiff's complaint, appearing at page 6, should read:

> Thereafter appellant sued for a declaratory decree, alleging that the "*State Board of Accountancy, without authority of law*, has adopted as their policy the arbitrary rule" the effect of which is a violation of appellant's rights under the 14th Amendment (Tr. 6-7). (Emphasis supplied)

(2) The attempted summary of the opinion of the Supreme Court of Florida, appearing at page 7, is inaccurate, and reference is made to the full text of the opinion which is included at page 3a *et seq.* of the Appendix.

ARGUMENT

1. This Appeal Does Not Present Any Substantial Federal Question

In his statement of the questions presented by this appeal, appellant draws into question the constitutionality of the provisions of Chapter 473, Florida Statutes, particularly Sections 473.16 and 473.23(3), under Sec. 1 of the 14th Amendment. His first two questions present merely different aspects of this alleged repugnancy of the statute, and for purposes of this argument will be considered together. For this part of the argument it will be assumed that these questions were properly raised and passed on by the courts below, but

appellees do not concede the correctness of this assumption, as more fully hereinafter discussed.

Underlying appellant's entire contention with respect to alleged unconstitutionality is a basic erroneous premise which he has assumed. The Supreme Court of Florida, despite appellant's repeated contentions to the contrary, has not unqualifiedly denied him the right to practice his profession of accountancy in the State of Florida in the event that he elects to become a partner in the non-resident firm of Peat, Marwick, Mitchell & Co. The court affirmatively ruled that appellant is simply prohibited from practicing in that state *as a member* of such firm unless or until all the members thereof are Florida certificate holders.

> "We do not think the statute prohibits a licensed Florida accountant from practicing public accounting in this state in his own name even though he may have an interest in a non-resident firm of accountants; he is simply prohibited from practicing in this state *as a member of* such firm and from representing that such firm is practicing as 'Certified Public Accountants' unless the members thereof are Florida CPA's." (Excerpt from opinion below, Appendix 8a)

No right or privilege has been denied appellant to continue his practice of accountancy as a CPA in any other capacity than as a partner of a non-resident firm which he would represent or hold out to the public of Florida as practicing as "Certified Public Accountants". Accordingly, the authorities relied upon and cited by appellant dealing with the constitutional right to engage in a lawful private business unfettered by arbitrary state curtailment or regulation are clearly not germane to this appeal.

There can now be no question that a state may, in the proper exercise of its police power, prescribe certain standards and regulations controlling the practice of the profession of accountancy as one of the learned professions. *Lehmann* v. *State Board of Accountancy*, 263 U. S. 394; *Berkowitz* v. *Wilson*, (1952) 118 N.Y.S. 2d 261, affirmed (1954) 307 N. Y. 851; *Frazier* v. *Shelton*, 320 Ill. 253, 150 N. E. 696.

A residency requirement in such a state regulatory statute, such as the residence requirement of the Florida statute here in question (Sec. 473.08 (1) and (3), Appendix 17a, 18a), is not *per se* unconstitutional as an abridgement of privileges and immunities under Sec. 1 of the 14th Amendment. *Quong Ham Wah Co.* v. *Industrial Accident Co.*, 255 U. S. 445; *Douglas* v. *New York N. H. & H. R. Co.*, 279 U. S. 377; *Haavik* v. *Alaska Packers Assoc.*, 263 U. S. 510; *La Tourette* v. *McMaster*, 248 U. S. 465.

In *La Tourette* v. *McMaster, supra*, a two year residency requirement as a prerequisite to issuance of a license to insurance brokers in South Carolina was held not to violate the "privileges and immunities" clause of the Constitution. Without hesitation this Court pointed out the distinction between "resident" and "citizen" and declared that the residency requirement constituted no discrimination with respect to "citizenship". The statute was held to apply equally to all citizens, of other states as well as citizens of South Carolina, in that all such "citizens" must reside within the state for the required two years before qualifying for the insurance brokers license. The rationale of this residency requirement is plain and it reasonably relates to the protection of unwary citizens against, among other things, would-be unscrupulous insurance brokers.

Such protection is obviously better secured through residents who would be under the supervision and control of a governing commission. This reasoning applies with equal force to the practice of the profession of accountancy.

In *Haavik* v. *Alaska Packers Assoc., supra,* this Court upheld the validity of a tax on non-resident fishermen in Alaska waters, which did not apply to Alaska residents, stating at page 515 (263 U. S.):

> "* * * we find nothing in the Constitution which prohibits Congress from favoring those who have acquired a local residence and upon whose efforts the future development of the territory must largely depend."

for it is

> "* * * only when variations are arbitrary and without reasonable legal basis that an unconstitutional discrimination occurs. A long line of decisions has molded this judicial concept."
>
> *United States* v. *Burnison,* 339 U. S. 87 at page 95

With respect to the third and last question presented by appellant, assuming, *arguendo,* that the practice of accountancy in some degree partakes of an interstate character (although appellees believe that there exists a grave doubt as to the application of the interstate commerce clause to the practice of a learned profession such as law, medicine, or accountancy), nevertheless, state enactments in the exercise of the police power of the state are valid notwithstanding that such enactments or regulations may incidentally or indirectly affect commerce. *The Minnesota Rate Cases,* 230 U. S.

352; *Terminal Railroad Ass'n of St. Louis* v. *Brotherhood of Railroad Trainmen*, 318 U. S. 1.

In the *Minnesota Rate Cases, supra*, this Court, speaking through then Mr. Justice Hughes, stated at page 402:

> "Further, it is competent for a state to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people although interstate commerce may incidentally or indirectly be involved."

2. The Federal Questions Sought to be Reviewed Were Not Expressly Passed Upon Below

Appellant in his Jurisdictional Statement has not fully complied with the provisions of Rule 15 (d) of this Court. He does state (page 6) that the complaint in the trial court alleged "violation of appellant's rights under the 14th Amendment," but reference to his complaint (Tr. 7) shows that the violation charged was the arbitrary rule adopted by the defendant members of the Board of Accountancy "without authority of law". He further states that the trial court, by its Summary Final Decree in his favor (1a), construed the statute differently so as to avoid the Constitutional objection. No further reference to the raising of the federal questions, now presented, is made in the Statement with respect to the subsequent proceedings in the Supreme Court of Florida, unless reference is made to the opinion of that court, included in the Appendix (3a-8a), where at page 7a the court deals with his contention that to construe the statute other than as the trial court had construed it would be an unreasonable

restraint upon freedom of contract and unconstitutional.

As already stated, the complaint did not allege that the statute in question was repugnant to the Constitution but that it had been incorrectly construed and applied by the arbitrary rule adopted by the appellees-defendants (Tr. 7). This was the issue presented to the trial court. Appellant prevailed in the trial court. As appellee before the Supreme Court of Florida in urging affirmance he, of course, defended the construction of the statute adopted by the trial court, contending, as stated above, that any different construction would constitute an unreasonable restraint upon freedom of contract. When the Supreme Court of Florida construed the statute adversely to appellant, and reversed the trial court, the appellant's petition for rehearing (10a-13a) alleged that the *construction* and *application* of the statute adopted by the Supreme Court constituted an unreasonable interference and burden upon interstate commerce and was in conflict with the due process and equal protection clauses of the Constitution. He again did not attack the statute itself as repugnant and void but complained again only of the construction made of its provisions. The petition for rehearing was denied without any reference by the court to the alleged federal questions, the Supreme Court of Florida thus reaffirming its previously announced construction of the statute. Accordingly, the Jurisdictional Statement does not specify how the other federal questions, now alleged, were raised and whether they were passed upon by the Supreme Court of Florida, as required by Rule 15 (d).

As appellant now phrases the questions presented by his appeal, the Florida statute itself is attacked as

repugnant and void, nor the construction or application of it made by either the appellees or the court. As demonstrated by the record this contention was not made in either court below and is now made here for the first time. The federal questions as now presented by appellant were not passed upon below, and this Court is without jurisdiction to consider them. Review by this Court is limited to the specific federal questions which were properly raised in the state court. *Whitney* v. *California*, 274 U. S. 357, 362-3; *Dewey* v. *Des Moines*, 173 U. S. 193, 197-8; *Louisville etc. R. Co.* v. *Louisville*, 166 U. S. 709; *Wilson* v. *Cook*, 327 U. S. 474, 483-4; *Adler* v. *Board of Education*, 342 U. S. 485, 496; *State Farm Mutual Ins. Co.* v. *Duel*, 324 U. S. 154, 160-1.

3. The Judgment of the Supreme Court of Florida Rests on an Adequate Non-Federal Basis

The Supreme Court of Florida in this case was called upon to construe and apply an enactment of the legislature regulating the practice and admission to practice of Certified Public Accountants within that state. It has adopted an authoritative construction of this regulatory statute. This is clearly a declaration of state law within a field peculiarly within the police power of the state, as already more fully discussed herein. No federal question is involved in this determination and statement of the law of Florida. The judgment appealed from clearly rests on an adequate non-federal basis. This Court has consistently and correctly adhered to the principle that it will not review a state court judgment based upon an adequate and independent non-federal ground, even in cases where a federal question may be involved and perhaps not correctly decided. *Murdock* v. *Memphis*, 20

Wall. 590, 636; *Berea College* v. *Kentucky*, 211 U. S. 45, 53; *Fox Film Corp.* v. *Muller*, 296 U. S. 207.

CONCLUSION

We respectfully submit, therefore, that the appeal presents no substantial federal question; that the federal questions presented by the Jurisdictional Statement and sought to be reviewed were not expressly passed upon below; and the Judgment of the Supreme Court of Florida clearly rests on an adequate non-federal basis. This appeal should, accordingly, be dismissed.

Respectfully submitted,

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